

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

JENNIE BLACKBURN, as Administratrix of the
Estate of JOHN BLACKBURN,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

FILED

MAY 8 - 1907

PAUL F. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JENNIE BLACKBURN, as Administratrix of the
Estate of JOHN BLACKBURN,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	3
Assignments of Error	18
Certificate of Clerk U. S. District Court to Transcript of Record on Appeal	43
Citation on Appeal	45
Complaint	1
Defendant's Proposed Bill of Exceptions	21
Judgment	8
Motion for New Trial	12
Names and Addresses of Counsel	1
Notice of Appeal	16
Order Allowing Appeal	41
Order Denying Motion for New Trial	13
Order Fixing Time to and Including February 1, 1931, to Lodge Proposed Bill of Excep- tions	11
Order Fixing Time to and Including March 1, 1931, to Lodge and Settle Proposed Bill of Exceptions	14
Order Fixing Time to and Including March 20, 1931, to Lodge and Settle Proposed Bill of Exceptions	16

Index.	Page
Order Settling Bill of Exceptions	40
Petition for Appeal	17
Praeceptum for Transcript of Record	42
Reply	7
Stipulation Fixing Time to and Including February 1, 1931, to Lodge Proposed Bill of Exceptions	10
Stipulation Fixing Time to and Including March 10, 1931, to Lodge and Settle Proposed Bill of Exceptions	14
Stipulation Fixing Time to and Including March 20, 1931, to Lodge and Settle Proposed Bill of Exceptions	15
TESTIMONY ON BEHALF OF PLAINTIFF:	
BLACKBURN, JENNIE	27
Cross-examination	29
CHRISTIE, C. R.	25
LYTLE, DR. ELMER E.	29
Cross-examination	30
Redirect Examination	32
Recross-examination	32
Redirect Examination	33
MISENER, ROY B.	26
Cross-examination	27
POLLEY, R. C.	23
Cross-examination	24
RENCHEY, FRANK	21
Cross-examination	22
Redirect Examination	23

TESTIMONY ON BEHALF OF DEFEND-
ANT:

BARNES, DR. ARTHUR L.	34
Cross-examination	35
BROWN, DR. KIRK	36
Cross-examination	36
Redirect Examination	37
Recross-examination	37
FEAMAN, DR. A. C.	37
Cross-examination	38
WILSON, C. E.	33
Cross-examination	34
Verdict	8

NAMES AND ADDRESSES OF COUNSEL.

Messrs. ANTHONY SAVAGE and CAMERON
SHERWOOD, Attorneys for Appellant,
310 Federal Building, Seattle, Washing-
ton.

GRAHAM K. BETTS, Esquire, Attorney for Ap-
pellee,
1402 Smith Tower, Seattle, Washington.

(Title of Court and Cause.)

COMPLAINT.

The plaintiff complains of the defendant and for
cause of action alleges:

I.

That the plaintiff is the duly qualified and acting
administratrix *ad prosequenden* of the estate of
John R. Blackburn, deceased, and is a resident of
Bothell, Washington.

II.

That said *Jour* R. Blackburn, deceased, enlisted
for Military Services in the United States Army
on the 30th day of March, 1917, and was honorably
discharged from said service on the 25th day of Sep-
tember, 1919.

III.

That in or about the month of October, 1917, de-
siring to be insured against the risks of war, de-
ceased applied for a policy of war risk insurance

in the sum of \$10,000.00, and thereafter there was deducted from his monthly pay the sum of \$6.40 as premium for said insurance, and the plaintiff has been informed and believes that a policy of war risk insurance was duly issued to said deceased by the terms whereof the defendant agreed to pay deceased the sum of \$57.50 per month in the event he suffered total and permanent disability as result of said service to such an extent that it would be impossible for him to follow continuously a substantially gainful occupation but that said policy was never delivered to the plaintiff.

IV.

That on the 5th day of October, 1918, the deceased was gassed as a result whereof he became afflicted with stomach disorder, intestinal trouble and pulmonary tuberculosis, by reason whereof, he was discharged as aforesaid, totally and permanently disabled from following continuously any substantially gainful occupation, and as a proximate result thereof he died on the 10th day of December, 1925.

V.

That by reason of the foregoing, John R. Blackburn, deceased, became entitled to receive from the defendant the sum of \$57.50 per month commencing on said date of discharge and continuing until the date of his death. That the plaintiff has made due proof of the foregoing to the defendant, and has demanded payment of the aforesaid amounts, but that the defendant has disagreed with the plain-

tiff and has refused and still refuses, to pay the same or any part thereof.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of \$4,312.50, together with her costs and disbursements herein.

BEARDSLEE & BASSETT,
Attorneys for Plaintiff. [1*]

State of Washington,
County of King,—ss.

Jennie Blackburn, being first duly sworn on oath, deposes and says: That she is the plaintiff in the above-entitled action and as such makes this verification; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JENNIE D. BLACKBURN.

Subscribed and sworn to before me this 4 day of January, 1928.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Feb. 2, 1928. [2]

(Title of Court and Cause.)

ANSWER.

Comes now the defendant herein, by its attorneys, Anthony Savage, United States Attorney for the

*Page-number appearing at the foot of page of original certified Transcript of Record.

Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

For answer to Paragraph I of plaintiff's complaint, defendant denies sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same.

II.

For answer to Paragraph II of plaintiff's complaint, defendant admits that John R. Blackburn enlisted in the military service of the United States on March 30, 1917, but denies each, every and singular the other allegations therein contained.

III.

For answer to Paragraph III of plaintiff's complaint, defendant admits that on November 16, 1917, John R. Blackburn made application for and was granted war risk insurance in the amount of \$10,000, payable in instalments of \$57.50 per month in the event of death or permanent total disability occurring while said insurance was in force, but denies each, every and singular the other allegations therein contained.

IV.

For answer to Paragraph IV of plaintiff's com-

plaint, the defendant denies each, every and singular the allegations therein contained.

V.

For answer to Paragraph V of plaintiff's complaint, defendant admits that a disagreement exists between the defendant and the plaintiff herein, and that the defendant has refused and still refuses to pay the claim, but denies each, every and singular the other allegations therein contained.

For further answer and by way of a first and affirmative defense, the defendant does allege as follows:

I.

That John R. Blackburn enlisted in the military service of the United States on March 30, 1917, and was discharged therefrom on September 27, 1919; that on November 16, 1917, plaintiff applied for and was granted war risk insurance in the amount of \$10,000, designating his brother, Russell Earl Blackburn, as beneficiary thereof; that this insurance lapsed for nonpayment of the premium due October 1, 1919, and was not in force and effect thereafter; that the permanent total disability of the plaintiff, if any, occurred after the date mentioned herein of the lapsation of said war risk insurance policy. [3]

WHEREFORE, having fully answered, defendant prays that the complaint of the plaintiff herein be dismissed with prejudice and that the defendant

may go hence with its costs and disbursements herein to be taxed according to law.

ANTHONY SAVAGE,

United States Attorney,

TOM DeWOLFE,

Assistant United States Attorney.

LESTER E. POPE,

Attorney, United States Veterans' Bureau.

United States of America,
Western District of Washington,
Northern Division.

Tom DeWolfe, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America;

That he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

TOM DeWOLFE.

Subscribed and sworn to before me this 8th day of August, 1928.

[Seal]

S. M. H. COOK,

Deputy Clerk, United States District Court, Western District of Washington.

[Endorsed]: Filed Aug. 9, 1928.

Received copy of the within answer.

Attorneys for Plaintiff.

August 9, 1928.

BEARDSLEE & BASSETT. [4]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and fix the date of the beginning of his total and permanent disability from September 25, 1919.

ED. GRINWALD,
Foreman.

[Endorsed]: Filed Dec. 9, 1930. [6]

United States District Court, Western District of
Washington, Northern Division.

No. 12,185.

JENNIE BLACKBURN, as Administratrix of the
Estate of JOHN R. BLACKBURN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT.

The above-entitled cause having come duly on for trial the 9th day of December, 1930, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court, the plaintiff appearing in person and by her attorneys, Graham K. Betts and W. G. Beardslee, of counsel, the defendant, United

States of America appearing by Cameron Sherwood, Assistant United States District Attorney, and E. I. Burns, Special Counsel for the United States Veterans' Bureau, a jury having been duly empanelled and sworn to try said cause, and after having duly considered the evidence produced by both parties, and having, on the said 9th day of December, 1930, returned a verdict in favor of the plaintiff to the effect that John R. Blackburn became totally and permanently disabled on the 25th day of September, 1919, and in consequence thereof the plaintiff became entitled to receive from the defendant the sum of \$57.50 per month, commencing on the 25th day of September, 1919.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover from the defendant the sum of \$4,312.50, that being the amount due the estate on the \$10,000.00 Policy War Risk Insurance herein issued upon, at the rate of \$57.50 per month, commencing on the said 25th day of September, 1918, and continuing to and including the 25th day of November, 1925, said latter date being the last anniversary of a payment due hereunder prior to the death of the insured, said payments to be made as by law in such cases provided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Graham K. Betts is entitled to receive from said judgment as a reasonable attorney fee for his services in the above-entitled cause, the sum of \$431.25, that being 10% of the said [7] \$4,312.50 due the plaintiff herein, and

that he, his heirs, executors or assigns, is entitled to receive the further sum of 10% of each and every other payment hereinafter made by the defendant to the heirs, executors, assigns or beneficiaries of the decedent, John R. Blackburn on the said policy of insurance as a result of, or in consequence of, the entrance of this judgment, said payments to be made as by law in such cases provided.

To all of which the defendant excepts and its exception is hereby allowed.

Done in open court this 11 day of December, 1930.

JEREMIAH NETERER,
Judge.

O. K. as to form.

CAMERON SHERWOOD,
Asst. U. S. Atty.
EDWARD I. BURNS.

[Endorsed]: Filed Dec. 11, 1930. [8]

(Title of Court and Cause.)

STIPULATION FIXING TIME TO AND INCLUDING FEBRUARY 1, 1931, TO LODGE PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 1st day of February, 1931, in which to lodge its proposed bill of exceptions herein.

Dated at Seattle, Washington, this 12th day of December, 1930.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
W. G. BEARDSLEE,
GRAHAM K. BETTS,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 12, 1930. [9]

(Title of Court and Cause.)

ORDER FIXING TIME TO AND INCLUDING FEBRUARY 1, 1931, TO LODGE PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant herein, and pursuant to stipulation of both parties,—

IT IS HEREBY ORDERED that defendant herein may have up to and including the 1st day of Feb. 1931, in which to lodge its proposed bill of exceptions herein.

Done in open court this 12 day of December, 1930.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

GRAHAM K. BETTS,
Atty. for Pltf.

[Endorsed]: Filed Dec. 12, 1930. [10]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and Cameron Sherwood, Assistant United States Attorney for said District, and E. I. Burns, Special Counsel for the United States Veterans' Bureau, and petitions the above court for an order granting a new trial in the above-entitled cause, for the following reasons, to wit:

(1) Error in law occurring at the trial and duly excepted to by the defendant.

(2) Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

Received a copy of the within motion this 16 day of Dec., 1930.

GRAHAM K. BETTS,

Attorney for Pltf.

[Endorsed]: Filed Dec. 16, 1930. [11]

(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW
TRIAL.

This matter having come before the above-entitled court on the motion of the defendant herein for a new trial, and both parties having submitted said motion to the court for ruling thereon, without argument, and the court being duly advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion for a new trial herein be, and the same hereby is, denied, and an exception is noted on behalf of the defendant.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

GRAHAM K. BETTS,
Attorney for Plaintiff.

Received a copy of the within order this 16 day of Dec., 1930.

GRAHAM K. BETTS,
Attorney for Pltff.

[Endorsed]: Filed Dec. 22, 1930. [12]

(Title of Court and Cause.)

STIPULATION FIXING TIME TO AND INCLUDING MARCH 10, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 10th day of March, 1931, in which to lodge and have settled its proposed bill of exceptions herein.

Dated at Seattle, Washington, this — day of February, 1931.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

GRAHAM K. BETTS,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 2, 1931. [13]

(Title of Court and Cause.)

ORDER FIXING TIME TO AND INCLUDING MARCH 1, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant herein, and pursuant to stipulation of both parties,—

IT IS HEREBY ORDERED that defendant herein may have up to and including the 1st day of March, 1931, in which to lodge its proposed bill of exceptions herein, and have same settled.

Done in open court this 2d day of February, 1931.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Feb. 2, 1931. [14]

STIPULATION FIXING TIME TO AND INCLUDING MARCH 20, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 20 day of March, 1931, in which to lodge and settle its proposed bill of exceptions herein.

Dated at Seattle, Washington, this 5 day of March, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Asst. United States Attorney.
GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 5, 1931. [15]

ORDER FIXING TIME TO AND INCLUDING
MARCH 20, 1931, TO LODGE AND SETTLE
PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant herein, and pursuant to stipulation of both parties,—

IT IS HEREBY ORDERED that defendant herein may have up to and including the 20 day of Mar. 1931, in which to lodge and have settled its proposed bill of exceptions herein.

Done in open court this 5 day of March, 1931.

NETERER,

United States District Judge.

Received copy of within order this 5th day of March, 1931.

GRAHAM K. BETTS.

[Endorsed]: Filed Mar. 5, 1931. [16]

(Title of Court and Cause.)

NOTICE OF APPEAL.

To Jennie Blackburn, Plaintiff, and W. G. Beardslee and Graham K. Betts, Attorneys for Plaintiff:

YOU AND EACH OF YOU will please take notice that the United States of America, defendant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order

entered in the above-entitled cause on the 11th day of December, 1930, and that the certified transcript of record will be filed in the said Appellate Court within thirty days from the filing of this notice.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within notice of appeal this 5 day of March, 1931.

GRAHAM K. BETTS,

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [17]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above-named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 11th day of December, 1930, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said

order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said court in such cases made and provided.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney,

LESTER E. POPE,

Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within petition for appeal this 5 day of March, 1931.

GRAHAM K. BETTS,

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [18]

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above-entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, Seattle, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial

herein, and upon which it relies to reverse the judgment herein.

I.

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent, total disability of John R. Blackburn during the time his policy was in effect and to which denial defendant took exception at the time of the interposition of said motion herein.

II.

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the [19] defendant at the time of the interposition of said motion herein.

III.

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV.

The District Court erred in denying defendant's motion for a direct verdict at the close of the entire testimony, which motion was interposed on the ground that John R. Blackburn had not been proven to have been permanently and totally disabled from following a gainful occupation in a substantially continuous manner during the time his policy was in effect.

V.

That the Court erred in denying defendant's mo-

tion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI.

That the Court erred in admitting in evidence Plaintiff's Exhibits 1, 2 and 3, over objection of defendant, in that the admission of these exhibits deprived defendant of the right of cross-examination, and on the ground that they were self-serving declarations of plaintiff.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Asst. United States Attorney.

LESTER E. POPE,

Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within assignments of error this 5 day of March, 1931.

GRAHAM K. BETTS,

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [20]

[Endorsed]: Lodged Mar. 10, 1931.

Received copy of the within bill of exceptions this 9th day of March, 1931.

GRAHAM K. BETTS,

Atty. for Plff.

(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF EX-
CEPTIONS.

BE IT REMEMBERED, that heretofore and on, to wit, the 9th day of December, 1930, at the hour of ten o'clock A. M., the above-entitled cause came regularly on for trial in the above-entitled court before the Honorable Jeremiah Neterer, one of the Judges of said court, sitting with a jury, in the north courtroom of the Federal Building, at Seattle, Washington, the plaintiff appearing by his counsel, Graham K. Betts, the defendant appearing by its counsel, Cameron Sherwood, Assistant United States Attorney at Seattle, Washington, and Erwin I. Burns, Special Counsel, United States Veterans' Bureau, Washington, D. C.

WHEREUPON, the jury being duly empaneled and sworn to try the cause, the following proceedings were had and testimony taken, to wit:

TESTIMONY OF FRANK RENCHEY, FOR
PLAINTIFF.

FRANK RENCHEY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination.

My name is Frank Renchey, and I reside in Bothell. I knew Johnny Blackburn ever since his birth. He was in the neighborhood of six feet, I think,

(Testimony of Frank Renchey.)

when he went to the war, [21] not extremely heavy, but a good, rugged boy. I saw him shortly after he came back from service. I noticed that he had a slight cough all the time, and that his complexion was sallow, very yellow. I noticed that he was not as fleshy as before. I saw him up until the time he went to California before his death.

I worked with him at Mr. Wilson's mill packing shingles. Johnny was packing shingles, too. I do not know when he went to the hospital. I worked with him before he went to the hospital. He would get sick at his stomach while standing there packing. I worked with him another time. Sometimes he was sick at his stomach several times a day. I have seen him against the buckboard several times and he would have to leave and go outside suffering a vomiting attack. Sometimes he would be gone fifteen or twenty minutes after a spell. I don't think he worked regularly. I know he did not work a great deal.

Cross-examination by Mr. BURNS.

I was employed at Wilson's mill with Johnny Blackburn. I could not say how long we were employed there. I do not even know the year.

I saw Johnny Blackburn shortly after his discharge. When he came back to Bothell. I noticed that he coughed shortly after his return, possibly three or four months after his return, around town. I worked at the mill for quite a few years. It might have been closed down while Blackburn

(Testimony of Frank Renchey.)

was there. I thought Blackburn to be a good healthy lad before he went to service. I noticed his complexion was sallow when I first went with him to a dance. I do not know the date. [22]

Redirect Examination by Mr. BETTS.

I sure was a friend of Johnny Blackburn. I saw him when he came back from the army. He was in Bothell when I saw him.

Mr. SHERWOOD.—I move to strike the testimony of the witness on the ground that it is too indefinite.

The COURT.—Denied.

Mr. SHERWOOD.—Exception.

TESTIMONY OF R. C. POLLEY, FOR PLAINTIFF.

R. C. POLLEY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is R. C. Polley. I have lived at Bothell, Washington, for twenty years. I knew Johnny Blackburn over twenty years. I saw him soon after he came back from the war, the first week after his return.

I am foreman for King County Road Construction.

I should judge he weighed about 165 to 170 when he went in the army, and that he weighed 145 when

(Testimony of R. C. Polley.)

he returned. He had a hacking cough which continued. He would have spells of coughing and would have to sit down or lie down or something. He worked under my supervision for the county in April, 1921, April, May, June and July, I think. He was raking pea gravel. That is not hard work. He did not work steady. There was one month he worked pretty steady and then the next if I remember, he did not work so very much; a few days each month. He worked all day some days. I would have to send him home when he would have a sick spell. He would vomit if he would lift anything at all times of the day. He would go three or four days, be pretty good, and the next three or four days, he wouldn't be so good. [23]

Cross-examination by Mr. BURNS.

I do not recall the year John Blackburn was discharged. I do not know that Blackburn weighed 139 or 165 pounds when he went in the service. I don't know what he weighed when he came back.

(Testimony stricken with respect to the weight of John Blackburn.)

I would not be sure, but I think John Blackburn worked for me April, May, June and July, 1921. He worked all month in April, I think. He did not work two continuous months. He might have gone to work in March for the county. I think he worked a little over two months out of the four, but I do not know how regularly he worked in March, April, May,

(Testimony of R. C. Polley.)

June or July. He was raking pea gravel, labor. He did his work in a satisfactory manner while he was working. The same as any other man would do it. I think he was paid \$4.00 a day.

TESTIMONY OF C. R. CHRISTIE, FOR
PLAINTIFF.

C. R. CHRISTIE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is C. R. Christie, and I am employed by the United States Veterans' Bureau, and have charge of the records of the claimants. I have the records of the plaintiff. At the time a man enters the hospital he is given a diagnosis, and is given an examination before he goes to the hospital. I have an examination here but I can't identify it as being the one he was sent to the hospital on, made in July, 1921. I have no examination dated November 1, 1922. I have a rating of December, 1922, but it is not permanent and total. I have a record of his examination at Whipple Barracks, Arizona, January 15, 1924. These are regular records of the Bureau. [24]

Plaintiff's Exhibits 1, 2 and 3 offered.

Mr. BURNS.—I object, first, on the ground that the Government is deprived of its right of cross-examination and that the reports contained statements made by the man, himself, which are self-

(Testimony of Roy B. Misener.)

serving declarations. The plaintiff had every opportunity to call these doctors had he seen fit to do so and the Government would, then, have had an opportunity to cross-examine. By offering these examinations the Government is deprived of its right of cross-examination and we get into the record self-serving declarations.

The COURT.—Overruled.

Mr. BURNS.—Exception.

WITNESS.—I have report of first examination after Blackburn's discharge dated March 31, 1920.

Plaintiff's Exhibits 1, 2 and 3 admitted.

Mr. BURNS.—I offer report of first examination of insured.

Defendant's Exhibit "A-1" admitted in evidence.

TESTIMONY OF ROY B. MISENER, FOR PLAINTIFF.

ROY B. MISENER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Roy B. Misener. I used to live in Bothell. I knew Johnny Blackburn very well. I enlisted in the same company with Johnny and went overseas with him. I did not see him from Christmas, 1917, until the first part of May or June, 1918, on my way to the front. I met him for two hours on the train going to the front. I did not see him again until after we returned from the service.

(Testimony of Roy B. Misener.)

I believe Johnny returned shortly after March, 1919, during the summer.

I saw Blackburn in bed the first or second day he came back from France and went to see him on the porch of his home in Bothell. He appeared to be in a rundown condition. I saw him many times after that. I would see him every six weeks at his home. I met him on the street several times. I usually found him in bed most of the time. He was a very good friend of mine and I went to his home many, many times while he lay in bed, and sat and talked for half an hour or hour. [25]

Cross-examination by Mr. BURNS.

I do not know whether Blackburn was discharged in 1919 or 1920. I saw him immediately upon his return to Bothell as soon as he *was his* discharge from the army. I was not a particularly good friend of the family's. I was a good friend of Johnnie's. I never saw him do any work after his discharge. I understand that he worked at the Wilson mill a short time.

TESTIMONY OF JENNIE BLACKBURN, FOR
PLAINTIFF.

JENNIE BLACKBURN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Jennie Blackburn, and I am the

(Testimony of Jennie Blackburn.)

mother of John Blackburn. I am the plaintiff in this action. My son was discharged in the fall of 1919. He lived with me after his discharge, coming right home. When he came home he had to go to the Veterans' Bureau for examination and to the Cushman Hospital. He spent his winters there and the summers at home. From Cushman he went to Walla Walla. From there to Phoenix, Arizona, where he spent the winters, and the last winter he came home in that condition. There was no help for him after that. I saw him try to work, packing shingles in the shingle-mill. He would not be able to eat when he came home at night. Sometimes he would eat and sometimes he would not. He would have a coughing spell and vomit and then go to bed. I think he went to work at Wilson's mill in the fall of 1919, the same fall he came home. He did not go to work immediately. He was at home a time before he went to work. He would sit around home and read and rest. He could not place himself. He did chores around the house, but it would tire him. After he did the chores he would get sick and tired. He was worn out. [26] This was before he went to work for Wilson's. I could not say how long he worked at Wilson's, but it was not very long. It was not long before he had to go to the hospital. He worked for the county off and on after he worked at Wilson's mill. He was at Cushman Hospital two winters and spent a winter in Walla Walla and the last winter he went to Arizona and was sent back with a nurse. I am the administratrix of his estate.

(Testimony of Jennie Blackburn.)

Plaintiff's Exhibit 4 admitted in evidence, being letters of administration.

Cross-examination by Mr. BURNS.

My son returned home in the fall of 1919. He went to work at Wilson's mill in the fall of 1919. He may have worked for Wilson's mill in January, February and March of 1920. Mr. Polley is my niece's husband.

TESTIMONY OF DR. ELMER E. LYTLE, FOR PLAINTIFF.

Dr. ELMER E. LYTLE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Dr. Elmer E. Lytle. I am a physician and surgeon, and I have practiced in the State of Washington for 40 years. I practiced at Bothell, Washington. I have treated John R. Blackburn. The last time was from May 1, 1925, until June 13, 1925. I also treated him when he was a child.

I found him between May 1, 1925, and July 13, 1925, suffering from an advanced stage of tuberculosis—by advanced stage I mean a later stage. I could not tell just the number of years he had been suffering with tuberculosis, but it has existed over a rather long period of time. He was totally and permanently disabled at the time I examined him. I believe that he began [27] to suffer with tuber-

(Testimony of Dr. Elmer E. Lytle.)

culosis between the time he was gassed until the time he was first examined on July 19, 1921. He was totally and permanently disabled if he was in the hospital.

Cross-examination by Mr. BURNS.

If he had active tuberculosis he should not follow any occupation. I should say he was totally and permanently disabled from following continuously any gainful occupation.

Q. How long did that continue prior to the 21st of July, 1921? How long has he been totally and permanently disabled prior to that time?

A. Judging by the subsequent—he was not able at any time.

Mr. SHERWOOD.—I object to that. The answer is not responsive.

The COURT.—Not taking into consideration what followed, what would you say at that time how long had he been totally and permanently disabled?

A. In my opinion, he should not work any time.

The COURT.—That don't answer it.

Q. How long had he been totally and permanently disabled?

A. Well, from the time he first developed—

Q. (Interrupting.) You said while ago, from the time he was gassed. How long would that be reasonably certain to continue in the future, from that diagnosis and what preceded?

A. Rest is one of the main requirements—

The COURT.—(Interrupting.) Answer t h e

(Testimony of Dr. Elmer E. Lytle.)

question, how long would it be reasonably certain to continue in the future?

A. If he needed rest, he should not work, that is all.

Mr. SHERWOOD.—I ask that the jury be instructed to disregard the answer.

The COURT.—How long would that condition be reasonably—the total and permanent condition—be reasonably certain to continue in the future? [28]

A. Of course, that depends on so many things.

The COURT.—You have everything before you. You have the hypothetical question before you—the conditions on down, his employment and relations and this diagnosis—you say from this diagnosis, he was permanently and totally disabled from the time of his discharge or from the time of being gassed—now, then, how long, based on the same hypothesis, would this total and permanent condition be reasonably certain to continue in the future, a year or two years or five years or life?

A. I know the results—

The COURT. — (Interrupting.) Not judging anything by the results.

A. Under the proper treatment—

The COURT. — (Interrupting.) Answer the question, if you want to tell us what you know; if you don't know, tell us and if you know, tell us.

A. Please ask the question again.

The COURT.—You said, from what they asked you and the testimony as to the condition of the deceased from his discharge and this diagnosis, that

(Testimony of Dr. Elmer E. Lytle.)

on the 25th day of July, 1921, that you considered he was totally and permanently disabled from the date he was gassed in the army. Now, then, from the same hypothetical question and upon the same diagnosis, how long would you say the total and permanent disability condition would continue in the future?

A. If I remember—

The COURT.—(Interrupting.) Can you tell us?

A. No.

Redirect Examination by Mr. BETTS.

Q. Doctor, I believe you testified he was totally and permanently disabled, was he, Doctor?

Mr. SHERWOOD.—On what date?

Mr. BETTS.—I think he said from the date he was gassed.

A. I said it probably developed between the time he was gassed until a diagnosis was first made.

Recross-examination by Mr. SHERWOOD.

I am not a specialist in tuberculosis. His mother gave me his medical history at the time of the examination. The tuberculosis was not arrested when I examined him in May, 1925. I did not examine him at any time from September, 1919, until July, 1925. I do not know his condition during the intervening time. He may or may not have been working during [29] that time. I was their family doctor. I don't recall that he called upon me between the time he returned from service and the

(Testimony of Dr. Elmer E. Lytle.)

time I examined him in 1925. I remember seeing him but did not examine him in a medical way.

Redirect Examination by Mr. BETTS.

He died the following December after I examined him.

Mr. BURNS.—At this time the Government moves for an involuntary nonsuit on the grounds that the evidence offered by the plaintiff fails to establish a *prima facie* case; that there is nothing in the evidence to show that this man was permanently and totally disabled at any time while his insurance contract was in force and effect. The evidence that has been offered to-day is practically the same as the evidence that was offered at the previous trial.

(Argument.)

Motion denied.

Mr. SHERWOOD.—Exception.

TESTIMONY OF C. E. WILSON, FOR DEFENDANT.

C. E. WILSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is C. E. Wilson, Bothell. I am running a cigar-store now. I ran a shingle-mill in 1919 and 1920. I knew John R. Blackburn. He worked for me, I believe, in 1920. He began to work for me in the spring of 1920. He might have begun to work

(Testimony of C. E. Wilson.)

for me on January 19, 1920. I [30] can't remember the exact dates. He worked a month or so as a shingle packer taking loose shingles and putting them into bunches. He did his work in a satisfactory manner so far as I remember. I don't remember whether he was regularly in attendance. The mill runs eight hours. He worked eight hours a day. I paid him the same wages as others engaged in the same line of work. He did his work as well as that performed by others doing the same work. I cannot state exactly. I don't remember why he quit.

Cross-examination by Mr. BETTS.

I knew him quite well. He complained that he did not feel well, while he was in my employ.

TESTIMONY OF DR. ARTHUR L. BARNES,
FOR DEFENDANT.

Dr. ARTHUR L. BARNES, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Arthur L. Barnes, Portland, Oregon, and I am a physician. I have been engaged in this particular profession for forty years.

I have examined John R. Blackburn, the first time being in August, 1920. His major disability at that time was tenderness over the abdomen due to adhesions, resulting from an old appendicitis.

(Testimony of Dr. Arthur L. Barnes.)

That is the only major disability, and perhaps a nasal disability. I did not find any evidence of a tubercular condition in August, 1920. I did not find anything abnormal as to the lungs. I would have noticed any extensive involvement of the lungs had it been present. I examined Mr. Blackburn in December, 1920, and his condition was the same as in August, 1920. His condition at that time was not disabling to such an extent as to prevent him from following continuously a gainful occupation.

[31]

Cross-examination by Mr. BETTS.

I am testifying from my records and from a general recollection. I do not specialize in any particular disease. I referred him to an X-ray man at the time of the second examination. The adhesions were extensive enough to cause vomiting without any other involvement. He gave a complaint of stomach trouble. At one time he complained of a pain in the chest, stomach and bowels. I accepted Dr. Bates' recommendation after X-ray. Dr. Bates said it was due to adhesions. It is possible that pains in the stomach were caused by intestinal tuberculosis, but I don't know that this was true in this case. I did not make any such diagnosis. I did not find any evidence of any lung condition at all. An involvement of the intestines often occurs in tuberculosis cases. I suppose I gave him the usual chest examination of a general examiner, noting respiration and whether or not there was any dullness by percussion, that is, using the finger-tips,

(Testimony of Dr. Arthur L. Barnes.)

going over the chest wall, also by the use of a stethoscope, an instrument for listening to the sounds in the chest walls. I made several examinations a day at that time for the Public Health Service preceding formation of the Bureau.

TESTIMONY OF DR. KIRK BROWN, FOR DEFENDANT.

Dr. KIRK BROWN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Kirk Brown, physician and surgeon. I have been engaged in this profession for thirteen years. I examined John Blackburn, according to my records, in March, 1920. I found that he was suffering at that time from a chronic inflammation of the eyelids and adhesions of the intestines. Those were the only disabilities that I found at that time. I found no evidence of a tubercular condition. I examined him for tuberculosis and found no manifestations of it. [32] I considered at that time that his condition was such that he could follow continuously a gainful occupation.

Cross-examination by Mr. BETTS.

I was working for the Public Health Service at the time I examined him. I made an examination of his chest. I am not a specialist of tuberculosis. I made no X-ray. I could not say conclusively that

(Testimony of Dr. Kirk Brown.)

he did not have tuberculosis. I found abdominal adhesions. These adhesions could have caused stomach trouble he complained of. He did not have intestinal tuberculosis at that time. Intestinal tuberculosis is very difficult to diagnose. Stomach trouble is quite frequently found in earlier stages of intestinal tuberculosis. It is true that being gassed would cause such a weakening of the system as to give room for tuberculosis infection to develop. He could have had tuberculosis without my finding it.

Redirect Examination by Mr. BURNS.

I don't believe that I would have passed up a gross tubercular lesion.

Recross-examination by Mr. BETTS.

Incipient tuberculosis is not totally disabling but it would put him in a condition where he should not work, whether he did or not.

TESTIMONY OF DR. A. C. FEAMAN, FOR DEFENDANT.

Dr. A. C. FEAMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Albert C. Feaman, Seattle, Washington. I am a physician and surgeon, confining my work to the diseases of the heart and lungs. I have specialized the past 11 years in diseases of the

(Testimony of Dr. A. C. Feaman.)

heart and lungs. I have examined many men who were subjected to gas while in the service. My observation has been that the percentage of the cases who have been [33] subjected to war gasses are no greater as a result of that experience, the percentage that developed tuberculosis. Men who have been subjected to war gasses, chlorine, mustard gasses, the damage is done at the time of the gassing and the various countries of Europe and American forces made a survey, because they thought that warfare gasses were responsible for the production of a greater number of tuberculosis cases but after a very careful survey of cases, who have been gassed, it is shown that percentages showed no greater amount of tuberculosis than men who had never seen or been touched in any way by warfare gasses. So, the conclusion was drawn, warfare gassing was not responsible for the production of tuberculosis. Tuberculosis of the intestinal tract is represented by reason of intestinal irritation or inflammation. Vomiting is not an indication of tuberculosis of the intestines. As a rule, tuberculosis of the intestinal tract is always fatal. The period between the contracting of intestinal tuberculosis and death varies from a few months to several years, but usually a short period of time. It does not seem plausible that a man who died in 1925 could have been affected with tuberculosis of the bowels in 1919.

Cross-examination by Mr. BETTS.

I have not examined John Blackburn. My observation has proven that a man who has been gassed

(Testimony of Dr. A. C. Feaman.)

is not in such a condition as to be more susceptible to tubercular infection than a man who has not been gassed. The lung of a man who has been gassed is no more liable to develop tuberculosis than that of anyone who has never been exposed to warfare gasses. The effect of gas is an immediate one. [34] It is true that a great many people have tuberculosis germs in their systems and do not know it is active. Every adult individual who has lived a city life has a primary infection. If a man is gassed it is hardly possible any man who has been gassed did not have some evidence of tuberculosis in his chest.

Mr. BURNS.—The Government rests.

Mr. BETTS.—No rebuttal.

Mr. BURNS.—At this time the Government desires to renew its motion for a directed verdict on the same grounds as originally stated.

The COURT.—The motion is denied.

Mr. BURNS.—Exception.

The COURT.—Noted.

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions, may be settled, allowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

LESTER E. POPE,

Regional Attorney, U. S. Veterans' Bureau. [35]

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

The above case coming on for hearing on application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same, together with exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions; and the parties hereto having stipulated and agreed upon said bill; the Court being duly advised,

IT IS BY THE COURT ORDERED that said bill of exceptions be and it hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct bill of exceptions, [36] and the Clerk of the court is hereby ordered to file the same as a record of said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the Clerk of this court attach all of the exhibits in this cause to

said bill of exceptions, making the same a part hereof.

Dated this 30 day of March, 1931.

JEREMIAH NETERER,
United States District Judge.

O. K.

[Endorsed]: Filed Mar. 30, 1931.

G. O. B. 14, pg. 69. [37]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On the application of the defendant herein—

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 11th day of December, 1930, be, and the same is hereby allowed.

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 9 day of March, 1931.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within order this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [38]

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the documents listed below.

Complaint.

Answer.

Reply.

Verdict.

Judgment.

Stipulation and order allowing defendant to February 1, 1931, to file bill of exceptions.

Motion for new trial.

Order denying motion for new trial.

Stipulation and order extending time to lodge bill of exceptions to March 1, 1931.

Stipulation and order extending time to lodge and settle bill of exceptions to March 20, 1931.

Notice of appeal.

Petition for appeal.

Assignments of error.

Order allowing appeal.

Citation on appeal.

Bill of exceptions.

Original exhibits both offered and admitted.

Copy of this praecipe.

ANTHONY SAVAGE,

United States Attorney.

CAMERON SHERWOOD,

Assistant United States Attorney.

Received a copy of the within praecipe this 11 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 12, 1931. [39]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the above-entitled court, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 41, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause (except captions, etc., where omitted) as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to wit:

Clerk's fees (Act Feb. 11, 1925) for making certificate, record or return 100 folios, at 15¢	\$15.00
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record..	.50
Certificate of Clerk to Original Exhibits....	.50
	<hr/>
Total	\$21.00

[40]

I hereby certify that the above cost for preparing and certifying record, amounting to \$21.00, has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, this 7th day of April, 1931.

[Seal]

ED. M. LAKIN,

Clerk of the United States District Court, Western District of Washington.

By E. W. Pettit,
Deputy. [41]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States to Jennie Blackburn, as Administratrix of the Estate of John Blackburn, Plaintiff, and W. G. Beardslee and Graham K. Betts, Her Attorneys.

YOU, AND EACH OF YOU, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, on the 10th day of April, 1931, pursuant to an order allowing appeal filed in the office of the Clerk of the above-entitled court, appealing from the final judgment signed and filed on the 11th day of December, 1930, wherein the United States of America is defendant, and Jennie Blackburn, as administratrix of the estate of John Blackburn, is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 9 day of March, 1931.

[Seal]

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation on appeal this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931.

[Endorsed]: No. 6436. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jennie Blackburn, as Administratrix of the Estate of John Blackburn, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 10, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.